BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JONI L. RIDDLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,045,819
RIGHT AT HOME	)	
Respondent	)	
AND	)	
	)	
COMMERCE & INDUSTRY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the July 2, 2009, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

On March 6, 2009, claimant was injured while returning to Wichita, Kansas, in a handicapped-equipped van driven by a co-worker, April Dryer. The accident occurred between Ms. Dryer's home in Wichita and the nursing facility in El Dorado, Kansas, where claimant and Ms. Dryer had returned respondent's client, Helen, following a trip to Branson, Missouri. In the July 2, 2009, Order, Judge Clark denied claimant's request for workers compensation benefits after finding the accident did not arise out of and in the course of employment with respondent.

Claimant advances at least three reasons why this accident is compensable under the Workers Compensation Act; namely, the accident occurred as a result of a co-worker's negligence, travel was an integral part of the job in this instance, and claimant was on a special purpose trip when the accident occurred. In addition, citing *Hiatt*[1] and *Halford*[2] claimant maintains Ms. Dryer would have been covered under the Workers Compensation Act at the time of the accident because the co-worker received transportation expense for

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[1] See *Hiatt v. Bob Bergkamp Const. Co., Inc.*, No. 1,020,845, 2006 WL 546155 (Kan. WCAB Feb. 28, 2006).

[2] See *Halford v. Nowak Const. Co.,* 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008).

driving the van and the van was specially equipped. Accordingly, claimant argues that if Ms. Dryer was acting in the course of her employment with respondent at the time of the accident then the Workers Compensation Act limits claimant's remedy to that provided by the Act. Claimant summarizes her argument, as follows:

> Under the facts of the present case, it is clear that Ms. Dryer would have been covered for workers compensation had she been injured on the way home from dropping Helen at the nursing home. Obviously if Ms. Dryer is covered, a co-worker receiving a ride home from that same employment should also be covered. In other words, [claimant's] claims against Ms. Dryer are barred by the exclusive remedy of the workers compensation laws because Ms. Dryer was in the course of her employment when the accident occurred. [Claimant's] only remedy is through the workers compensation laws for the State of Kansas. It is respectfully requested that Judge Clark's decision be reversed. . . . [3]

Claimant requests the Board to reverse the July 2, 2009, Order and remand the claim to the Judge for further proceedings.

Respondent, however, requests the Board to affirm the Order. Respondent argues claimant regularly commuted between home and the nursing facility in El Dorado and the accident occurred during such commute. Respondent denies that (1) claimant and Ms. Dryer were on a special work errand, (2) claimant was injured due to Ms. Dryer's negligence, and (3) travel was an integral part of claimant's job. In short, respondent maintains the "going and coming" rule precludes claimant from receiving workers compensation benefits for her March 6, 2009, accident.

The only issue before the Board on this appeal is whether claimant's accident arose out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned finds:

On March 6, 2009, claimant broke her left arm when a co-worker, April Dryer, slammed on the brakes of the van they were in to avoid a collision. The accident occurred between the nursing facility in El Dorado, Kansas, where claimant regularly worked, and Wichita, Kansas, where she lived.

Claimant is employed by respondent as a certified nursing assistant (CNA). On the day of the accident, claimant and Ms. Dryer had returned to the El Dorado nursing facility following a four-day trip they had taken to Branson, Missouri, with one of respondent's

[3] Claimant's Brief at 3 (filed July 17, 2009).

clients, Helen. Helen is wheelchair-bound and, consequently, two CNAs are assigned to her care. A handicapped-equipped van, which is used to transport Helen on trips and errands, is kept at the home of Ms. Dryer, the other CNA assigned to Helen. The van is provided by either Helen or a trust in which she is a beneficiary. When driving the van, Ms. Dryer receives mileage expense reimbursement from either Helen or the trust.

According to one of respondent's co-owners, Carla Shepherd, respondent did not have any part in obtaining or leasing the van for Helen, nor did respondent pay Ms. Dryer mileage for driving the van. Ms. Shepherd also testified that normally when a client needs transportation either respondent's car or the employee's car will be used.[4]

When claimant was assigned to Helen, claimant would normally commute from her home in Wichita to El Dorado. Claimant would clock in at the nursing facility and at the end of the workday she would clock out. On days when claimant worked alongside Ms. Dryer, who also lived in Wichita, they would sometimes ride together. Respondent did not pay claimant for the time spent traveling between her home and the El Dorado nursing facility. Claimant testified, however, she was paid 6 cents per mile for her mileage between home and El Dorado.[5] Diane Frederick, who owns the geriatric care management company Keystone Support Services (Keystone), testified that her company subcontracts with respondent for CNAs and that Keystone pays mileage to those caregivers for using their own vehicles to and from work.[6]

On March 6, 2009, following their trip to Branson, claimant and Ms. Dryer returned Helen to the El Dorado nursing facility where Helen lived. After getting Helen settled in, claimant clocked out at approximately 1 p.m. During the trip to Ms. Dryer's home in Wichita Ms. Dryer abruptly slowed the van to avoid a collision. Claimant struck the dashboard of the van and fractured her left arm.

Only accidents that arise out of and in the course of employment are compensable under the Workers Compensation Act.[7] And, generally, those accidents that occur while going to, or after leaving, work do not arise out of and in the course of employment. The "going and coming" rule contained in K.S.A. 2008 Supp. 44-508(f) provides in pertinent part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee

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[4] P.H. Trans. at 48, 49.

[5] *Id.*, at 36.

[6] *Id.*, at 52.

[7] K.S.A. 2008 Supp. 44-501(a).

> occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2008 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accident and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, unless the accident occurs on the employer's premises, the accident is caused by the employer's negligence[8] or the accident occurred on a certain route having a special risk or hazard.

In *Thompson*, the Kansas Supreme Court, while analyzing what risks were related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[9]

The Kansas appellate courts have also provided additional exceptions to the "going and coming" rule. For example, an accident is compensable if it occurs while operating a motor vehicle on a public roadway and travel is an integral part or is necessary to the employment.[10] Other examples are work-related errands and special purpose trips.[11]

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[8] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[9] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[10] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[11] *Mendoza v. DCS Sanitation*, 37 Kan. App. 2d 346, 152 P.3d 1270 (2007) (worker's trip to off-work site to pick up paycheck compensable as work-related errand); *Ridnour v. Kenneth R. Johnson, Inc.*, 34 Kan. App. 2d 720, 124 P.3d 87 (2005), *rev. denied* 281 Kan. 1378 (2006) (worker's injury while driving home to pick up keys to unlock work site was compensable); *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997) (injury in parking lot after attending continuing education seminar compensable).

In the present case, the evidence establishes that claimant was injured while commuting between her usual place of employment in El Dorado and Wichita, where she lived. Travel was not an integral part of claimant's job. And claimant was not on an errand or special purpose trip at the time of her accident. Conversely, the evidence establishes that claimant had been on a special purpose trip to Branson but that trip had concluded when claimant returned to the El Dorado nursing facility and she clocked out.

The undersigned affirms the Judge's conclusion that claimant's March 6, 2009, accident did not arise out of and in the course of her employment with respondent. Accordingly, the preliminary hearing Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the July 2, 2009, Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of August, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Jon E. Newman, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[12] K.S.A. 44-534a.